Supreme Court, U.S.
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In The
Supreme Court of The United States

RONALD NAPOLEON WOLFE, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI with Appendix (bound separately)

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QUESTIONS PRESENTED

QUESTION 1

WAS THE "PLAIN VIEW" EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT AVAILABLE TO THE PROSECUTION WHEN THE SEIZING OFFICER KNEW HE COULD NOT SEIZE THE PROPERTY AT ISSUE UNDER THE TERMS OF THE SEARCH WARRANT HE WAS EXECUTING, WHEN HE HAD AMPLE TIME TO SEEK A SECOND SEARCH WARRANT WITHOUT PUTTING HIMSELF AND HIS FELLOW OFFICERS IN JEOPARDY, AND WHEN THERE WAS NO RISK THAT THE PROPERTY WOULD BE LOST, DAMAGED OR MOVED WHILE A SECOND SEARCH WARRANT WAS BEING SOUGHT?

QUESTION 2

DOES THE "PLAIN VIEW" EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT PERMIT A WARRANTLESS SEIZURE OF PROPERTY FROM A CITIZEN'S HOME WHEN THE SEIZING OFFICER DID NOT CONCLUDE FROM HIS IMMEDIATE SENSORY PERCEPTIONS THAT THE PROPERTY WAS CONTRABAND OR EVIDENCE OF ANY CRIME?

QUESTION 3

DOES AN AFFIDAVIT WHICH FAILS TO CONTAIN ANY FACTUAL ALLEGATIONS THAT ANY OF THE PROPERTY THE EXECUTING OFFICERS WISH TO SEARCH FOR IS NOW IN OR HAS EVER BEEN IN A CITIZEN'S HOME MEET THE FOURTH AMENDMENT'S PROBABLE CAUSE REQUIREMENTS SO AS TO PERMIT A SEARCH OF THAT HOME?

QUESTION 4

DOES PROBABLE CAUSE TO BELIEVE THAT STOLEN PROPERTY MAY BE PRESENT IN NON-CONTIGUOUS OUTBUILDINGS PERMIT POLICE OFFICERS TO SEARCH A CITIZEN'S HOME FOR THAT PROPERTY OR RECORDS PERTAINING TO THAT PROPERTY, WHEN THE UNDERLYING AFFIDAVIT FAILED TO ALLEGE THAT SUCH PROPERTY OR RECORDS HAVE EVER BEEN OR IS THEN IN THE CITIZEN'S HOME?

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QUESTION 8

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QUESTION 10

SHOULD THE DECISIONS OF THE MICHIGAN COURTS THAT THE SEARCH OF PETITIONER'S HOME VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS REQUIRE THE COURT OF APPEALS TO GRANT THOSE DECISIONS THE FULL FAITH AND CREDIT DESCRIBED IN 28 U.S.C §1738?

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OPINIONS BELOW

The October 11, 2000 Opinion of the Sixth Circuit Court of Appeals is reproduced as App. F. The January 12, 2001 Order denying Petitioner's timely Petition for an *En Banc* Rehearing is reproduced as App. G. The September 1, 1998 and January 13, 1999 Opinions of the District Court are reported at 22 F. Supp. 2d 627 (E.D. Mich. 1998) and 32 F. Supp. 2d 945 (E.D. Mich. 1999) and are reproduced as App. A and App. B, respectively. The June 19, 1998 Opinion and Order of the Livingston County (Michigan) Circuit Court is reproduced as App. C. The September 17, 1999 Opinion of the Michigan Court of Appeals affirming the Circuit Court's decision is reproduced as App. D, and the January 21, 2000 Order of the Michigan Supreme Court is reproduced as App. E.

JURISDICTION

The Sixth Circuit Court of Appeals, on October 11, 2000, affirmed the September 1, 1998 and January 13, 1999 decisions of the United States District Court for the Eastern District of Michigan. Petitioner filed a timely Petition for Rehearing *En Banc* on November 22, 2000. That Petition was denied on January 12, 2001. This Court has jurisdiction to review this case under 28 U.S.C. §1251(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions which are relevant to this case are the Fourth, Fifth and Sixth Amendments to the

Constitution of the United States. The text of those amendments is set forth below. The federal and state statutes which are relevant to this case are 28 U.S.C. §1738, and Michigan Compiled Laws Annotated (M.C.L.A.) §780.655 and §780.656. The text of those statutes is set forth below:

AMENDMENT 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

Criminal actions–Provisions concerning–Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §1738

§1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and

credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

M.C.L.A. §780.655

§780.655. Tabulation of property seized; filing; safe keeping of property; restoration to owner; disposition of other property

Sec. 5. When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate. The tabulation may be suppressed by order of the court until the final disposition of the case unless otherwise ordered. The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as

practicable after trial, stolen or embezzled property shall be restored to the owner thereof. Other things seized under the warrant shall be disposed of under direction of the court or magistrate, except that moneys and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Such moneys shall be credited to the general fund of the state, county or municipality.

M.C.L.A. §780.656

§780.656. Breaking of doors and windows

Sec. 6. The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

Statement of the Case

(A) The basis for federal jurisdiction in the Courts below.

This case involves a criminal charge against a federally licensed firearms dealer that he possessed an unregistered firearm in violation of 26 U.S.C. §5861(d). The District Judge denied Petitioner's motion and supplemental motion to suppress the relevant fruits of a December 23, 1996 search of his home by Michigan police authorities. Petitioner thereafter plead guilty to illegally possessing a firearm (silencer) pursuant to a Rule 11(a)(2) plea agreement, and the United States Court of Appeals accepted subject matter and appellate jurisdiction pursuant to 28 U.S.C. §1291.

(B) Why this case should be reviewed.

The decisions of the lower courts with respect to the "plain view" questions (1 and 2 above), are in direct conflict with decisions previously reached by this Court, by prior panels of the Sixth Circuit, and by several other Circuit Courts of Appeal.

The decisions of the lower courts upon the federal issue of whether the affidavit at issue met the "probable cause" requirements of the Fourth Amendment are in direct conflict with the decision of the Michigan court of last resort in this very case (Questions 3 and 10 above).

The decisions of the lower courts are also in conflict with decisions of this Court and other Courts of Appeals upon the questions related to the Fourth Amendment's "probable

cause" and "particularity" requirements (Questions 3, 5 and 6 above).

The facts of this case will allow this Court to decide important federal constitutional issues which Petitioner believes should be settled by this Court. Those issues are described in Questions 4, 7, 8 and 9 above.

(C) <u>The facts of this case.</u>

Petitioner became a Class III federally licensed firearms dealer in the early 1970s. He was employed as a police officer in Highland Park and Unadilla Township, Michigan from 1984 to 1990. Over the years, Mr. Wolfe sold Class III firearms to several police jurisdictions. Some of those firearms were test-fired upon the 50+ acre tract which was the object of the December 23, 1996 search at issue herein.

On December 6, 1996, Livingston County Detective Allan Perry began the investigation which culminated in the search at issue. He spoke to Harold Van Patten and William Harp, the men who were represented to be the source of most of the facts which were attributed to anyone in the affidavit at issue (App. J). Shortly before December 19, 1996, Perry took the results of his investigation to Dan Garber, a veteran Assistant Prosecutor (App. R, pp. 3-4), to seek the search warrant at issue. That search warrant was approved by Judge Michael Hegarty at 7:15 a.m. on December 23, 1996.

(1) The sufficiency of the affidavit.

Counsel respectfully contends that a fair evaluation of what is in and what is **not** in the affidavit, if made without regard to the eventual incriminating fruits of the search itself, will confirm that it contains absolutely no allegations of fact or even unsupported conclusions that any of the 11 types of property, records, photos, etc. the search warrant authorized Detective Perry to search for were **then in or had ever been in** Mr. and Mrs. Wolfe's **home**. The federal prosecutor stipulated to that construction of the affidavit (App. X, pp. 3-8). Detective Perry testified in both the federal and state courts that no one had told him, prior to the search, that any of the 11 types of property was then in or had ever been in Mr. and Mrs. Wolfe's home (App. X, pp. 7-9; App. P, pp. 3-4; App. Q, pp. 4-8, 12-15). When he entered Mr. Wolfe's gun vault, he had no idea whether any of the 11 types of property was located therein (App. P, pp. 11-12).[1] Per the affidavit, Petitioner had admitted to Mr. Van Patten that he had participated in the theft of building materials (App. K, pp. 5-7) and in the theft of roofing materials (App. K, pp.7-9). Both of these alleged admissions are now known to be false (App.

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[1]These facts bear heavily upon the "good faith" claim made by the Government. That issue is not addressed herein, because the Court of Appeals made no findings upon it. The property to be seized was described in the search warrant exactly as it was described in the affidavit.

A, pp. 15-16; App. S, pp. 3-5; App. Q, pp. 3-4; App. X, pp. 9-22). Detective Perry also falsely swore that he had either "personally verified" or "verified" several facts which tended to corroborate hearsay descriptions of events attributed to Mr. Van Patten and Mr. Harp. Judge Burress described each of the affidavit's misrepresentations and material omissions in great detail–with appropriate annotations to the eight (8) volumes of testimony received in the state court hearing (App. C, pp. 19-37). He also addressed and resolved the precise probable cause issue posed to Judge Gadola–whether **the contents of the affidavit** included sufficient facts to allow him to find, per the requirements of *Illinois v. Gates*, 462 U.S. 213, 236-239, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), that there was a "substantial basis" for concluding that there was "a fair probability" that contraband or evidence of a crime would be found in the particular place (the Wolfe's home) to be searched (App. C, pp. 17-18). Judge Burress held that:

> "The only structures upon the premises in which any evidence of any of the alleged crimes may be found are the new pole barn with a dark brown shingled roof and OSB siding, and a gray airplane hangar structure with a steel roof. A search of any other structure of the premises was not supported by probable cause."
> (App. C, p. 37)

During the state court hearing, Judge Hegarty testified that he had reviewed the six (6) page affidavit for five (5)

minutes after being summoned from his shower at approximately 7:00 a.m. on December 23, 1996 (App. U, pp. 3-5; *see also,* App. K, pp.1-2; App. L). After carefully re-reading the affidavit in Judge Burress' court, he agreed that it contained no allegations that any of the stolen material was then in the Wolfe home, and no allegations that any of the 11 types of property the search warrant directed the officers to search for and seize had ever been seen in the home (App. U, pp. 7-12).

The federal prosecutor attempted to stipulate this testimony (App. Y, pp. 5-7). Judge Gadola refused to accept that stipulation, and appeared to adopt Judge Hegarty's **personal opinion** that some records were more likely to be found in the home rather than the barn (App. U, pp. 9-10) as the equivalent of the affidavit containing allegations that such records were **actually** in the Wolfe's home (App. Y, pp. 8-11). Judge Hegarty re-affirmed his state court testimony that he had rejected affidavits which failed to allege that the property to be searched for was in the place to be searched (App. U, pp. 6-7; App. Y, p. 3-5).

(2) The plain view facts.

These are the issues which most clearly cry out for review by this Court. Judge Gadola acknowledged that unless the Government established an exception to the warrant requirement, the firearms "... must be suppressed at defendant's trial" (App. A, p. 33). The only exception to the warrant requirement the Government offered was the "plain

view" doctrine. Mr. Haviland acknowledged that it was the Government's burden to establish the applicability of that doctrine to the facts of this case (App. W, pp. 4-5).[2]

This issue has two (2) parts, i.e.:

(A) Was there an urgent enough need to seize the firearms to excuse the failure to seek a second search warrant?

The Government offered absolutely no evidence upon this issue. At the time Perry entered the vault, he was one (1) of five (5) armed police officers who were conducting the search in or near Mr. Wolfe's home. Mr. Wolfe was in jail, miles from his home. Mrs. Wolfe was the only non-police person in her home. She was unarmed, clad only in sweat pants and a bathrobe (App. V, pp. 3-4). An armed police officer was assigned to guard her throughout the search (App. V, pp. 6-8) to prevent her from interfering in any way with the search (App. Q, pp. 15-20). Perry knew, when he saw the marijuana and firearms in the gun vault, that the original search warrant did not authorize him to seize them (App. O, pp. 6-7). He had not expected to find marijuana in the vault.

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[2]Looking ahead for just a moment, this Court has described that burden to be "heavy" when police attempt to establish the existence of an **urgent enough need** to justify warrantless searches or arrests. *Welsh v. Wisconsin*, 466 U.S. 740, 749-750, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984).

When he saw it, his first instinct was to call Mr. Garber to ask if he (Perry) should obtain a second search warrant (App. O, pp. 7-8). He could have assigned one of the armed detectives who were at the scene to guard the door to the vault to make sure that none of its contents was disturbed while he (Perry) obtained a second search warrant. He knew seeking a second warrant would have allowed a judge to decide whether the presence of marijuana in the vault allowed him (Perry) to also seize any of the guns in the vault (App. O, pp. 8-9). He agreed that when he entered the gun vault, he and the other police officers on the scene were in total control of the premises, and that he had "ample" time to seek a second search warrant without endangering any of the officers, and without creating any risk that the contents of the vault would be lost or destroyed (App. Q, pp. 24-26). He confirmed all of these facts during his federal court testimony (App. X, pp. 47-58). Judge Hegarty and other Livingston County judges were available to consider requests for search warrants during the morning of December 23, 1996 (App. U, pp. 12-13).

Counsel to Petitioner argued that there were no facts to justify a failure to seek a second search warrant when Mr. Perry discovered the contents of the gun vault (App. W, pp. 5-6). That precise contention was squarely and repeatedly made to the Court of Appeals (App. GG, pp. 5-7; App. HH, pp. 3-6; App. II, pp. 2, 6-7). The Government neither objected to that issue being raised in the Court of Appeals, nor did it offer any meaningful response to it. Nevertheless,

the Court of Appeals, in both its original opinion (App. F) and in its denial of Petitioner's request for an *en banc* hearing (App. G), failed to acknowledge, address or resolve this issue.

(B) Was the criminal nature of the firearms "immediately apparent" to Detective Perry?

Judge Gadola held that **Perry** himself had probable cause to link the firearms with criminal activity when he first saw them based upon Perry's bald assertion that he had such probable cause (App. A, p. 35), and legal conclusions Perry did not testify he considered or drew when he found the firearms in "plain view" (App. A, pp. 35-38). Judge Gadola also held that Perry's training, experience and the facts and conclusions he testified to concerning his initial reaction to the firearms was irrelevant to the "immediately apparent" element of the plain view exception to the warrant requirement (App. A, pp. 40-41). The Court of Appeals affirmed Judge Gadola's plain view decision by adopting legal conclusions Perry did not draw, **and** by injecting a "reasonable person in Perry's situation" standard in concluding what was "immediately apparent" to Perry when he first saw the firearms in plain view (App. F, pp. 21-22). No case authority was offered to support this "reasonable person in Perry's situation" standard of review. Petitioner contests both of the lower court's "immediately apparent" rulings, particularly the Court of Appeals unilateral use of a

"reasonable person" standard without any citation of legal authority.

Perry had been a police officer since 1977 (App. O, pp. 3-4), and a detective for 10 of those years (App. W, pp. 8-9). He had sworn to over 100 search warrant affidavits (App. W, p. 9). He knew that an affidavit had to allege facts to establish that the property to be searched for was on the premises to be searched (App. X, pp. 22-24), that he was required to limit his search to the property listed in the warrant, and that he was not to search for other contraband he might think was at the place to be searched (App. X, pp. 23-27). Perry knew, on and before December 23, 1996, that Mr. Wolfe was a federally licensed firearms dealer (App. P, p. 10). He knew federally licensed dealers could lawfully possess firearms which non-licensed persons could not lawfully possess (App. X, pp. 38-39). He knew there were different classes of firearms dealers, but he did not know what class license Mr. Wolfe possessed (App. P, pp. 4-6). When he entered Mr. Wolfe's gun vault, he did not know what kinds of weapons different federally licensed dealers could lawfully possess (App. P, pp. 5-6; App. X, pp. 35-37), but he did know that persons with "proper licenses" could lawfully possess firearms such as automatic weapons, pen guns and silencers (App. Q, pp. 28-30).

Prior to December 23, 1996, Perry had been told by Mr. Harp and Mr. Van Patten, that Mr. Wolfe had a "secret" gun vault in the basement of his home (App. O, pp. 4-5).

Harp told Perry that Mr. Wolfe maintained hundreds of firearms in that vault, including illegal automatic weapons and silencers (App. O, pp. 5-6, 104-105; App. X, pp. 30-33). Perry did not investigate those allegations (App. O, pp. 5-6, 12-14; App. X, pp. 31-33), and when he entered upon Mr. Wolfe's property on December 23, 1996, he did not know whether Mr. Harp's allegations were true (App. O, p. 12-13). However, because of Harp's allegations, Perry spoke to federal ATF officer Randy Evans in late December, 1996, when he was about to search Mr. Wolfe's property (App. O, pp. 11-12; App. X, pp. 27-30). Perry asked Evans whether Mr. Wolfe's firearms license allowed him to possess automatic weapons or silencers (App. O, pp. 13-14; App. X, pp. 35-36). Perry made that inquiry of Mr. Evans because of Harp's allegations about such weapons and because **he did not then know** whether Mr. Wolfe could lawfully possess such weapons (App. X, pp. 35-37). Evans declined to answer Perry's question (App. O, pp. 13-14), but he told Perry that if he (Perry) saw "those things", or if Perry saw any "funny" weapons during the search, he (Perry) could call upon Mr. Evans for help (App. O, pp. 13-14; App. P, p. 21). Perry, despite his pre-search knowledge that the December 23, 1996 search warrant did not authorize him to search for or seize any firearms, admitted that he intended to search for firearms at Mr. Wolfe's home, including those he expected to find in the "secret" gun vault, in order to report his findings to Mr. Evans

for whatever action Evans deemed appropriate (App. O, pp. 14-16).

Perry had owned but one (1) firearm prior to December 23, 1996–his service revolver (App. P, pp. 15-16), and he had no expertise with firearms (App. P, pp. 13-14, 15-16., 19-20). When Perry entered the gun vault and saw the firearms therein, he admitted he could **not tell**, simply by looking at the firearms, whether they were illegally possessed by Mr. Wolfe! He made that admission in both the state and federal hearings (App. P, pp. 5-6; App. X, pp. 40-42). He called upon Mr. Evans, days after the search, to determine the legality of the weapons seized from the gun vault (App. X, pp. 41-43). The only guns he could tell were "loaded" when he made his initial observations inside the gun vault were revolver pistols, and he did not (then or ever) conclude that any of those pistols were illegally possessed or even suspicious (App. X, pp. 60-61). He could not tell, without handling and turning over the guns, pen guns and/or silencers[3] he saw in the gun vault, whether they failed to have serial numbers upon them (App. X, pp. 58-61).

Although Perry did not know what sort of registration books, documents, or other paperwork a federally licensed gun dealer was obligated to maintain with or near his firearms

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[3]The count to which Petitioner plead guilty charged him with possessing an unregistered silencer which bore no serial numbers (App. N, pp. 1-2).

(App. X, pp. 36-38; App. P, pp. 6-9), he initially contended that one of the reasons he seized the firearms from the vault was because he could not find sufficient "paperwork" in Mr. Wolfe's home (App. O, pp. 10-11). When questioned more closely about that contention he conceded that federal registration considerations were not a factor in his having seized firearms from Mr. Wolfe's vault, and that his "search" for "paperwork" occurred **after** the firearms were being "collected" (App. P, pp. 6-9).

Perry knew on December 23, 1996, that before possession of an otherwise innocent firearm could be rendered illegal because of it being "in with" or near "dope," the firearms had to in some fashion, "facilitate" or protect the illegal dope. He admitted that he "... couldn't make that determination ..." (App. Q, pp. 26-27). He told Judge Burress that when he discovered the marijuana in the gun vault, his first reaction (other than his consideration of the need for a second warrant) was that he recognized he had "a problem," and that pursuant to his customary practice, he called the prosecutor (Garber) for legal advice (App. P, pp. 11-14). He also specifically admitted that he did not associate any firearm he saw in the vault with the marijuana he found in the gun vault, and that this legal problem was why he called Mr. Garber "... in the first place," i.e.:

> Q. Well, don't–let me try it again. Did you associate any–any firearm that was seized from the house directly to

be related to the marijuana growth operation?

A. Well, I felt in my mind that that was a legal question. That's why I called Garber in the first place. It wasn't for me to determine whether or not these guns were connected to the dope. That may require an entirely different and lengthy investigation.

Q. Right.

A. So.

Q. So the answer to my question is you didn't one way or the other associate–

A. No.

Q. –any weapon with the marijuana growing in the materials.

A. Not any particular weapon, no. **There weren't any weapons in with the marijuana**, if that's what–"

(App. P, pp. 21-22; App. X, pp. 50-55) (emphasis added)

Perry did **not** testify that he concluded or that he was told by Mr. Garber that he could seize any of the firearms in Mr. Wolfe's vault because the "proximity" of the firearms to the marijuana violated Michigan's felony firearms statute.[4]

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[4]It did not, as of 1996, unless the firearm was accessible to or at the defendant's disposal. The weapons in the vault clearly were not accessible to or at Mr. Wolfe's disposal when Perry entered the gun vault. *People v. Williams*, 212 Mich. App. 607, 609; 538 N.W.2d 89 (1995),

Mr. Garber did **not** testify that **he told Perry** that he (Perry) could seize firearms from Mr. Wolfe's gun vault **because** they represented a violation of Michigan's felony firearms statute.

Perry eventually admitted that the "sole" reason he seized firearms from the gun vault was because Mr. Garber told him to do so, i.e.:

> Q. Right, you go in, you got a search warrant, you find something, you back out, go back to the judge, incorporate the first search warrant, tell him what you found, go back in.
>
> A. Yes, I'm familiar with that.
>
> Q. Why didn't you do that in this case?
>
> A. **Well, after speaking with the Prosecutor I was advised that I had enough to seize the growing operation.**
>
> Q. **So, you relied solely on his determination.**
>
> A. **Well, yes, that's what we do.**

(App. Q, p. 25) (emphasis added)

Perry had no information that the only weapon described in the affidavit as having been "used" by Mr. Wolfe to commit the crimes described therein (App. K, pp. 5-7) was in the gun vault when he entered it (App. O, pp. 15-20). Although some of the firearms he saw in the vault raised

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app. denied, 451 Mich. 860; 546 N.W.2d 262 (1996).

"questions" or "suspicions" in his mind, it was not until he called Mr. Garber that he decided to "... seize the weapons **for inspection**" (App. X, pp. 39-47). Those "questions" and/or "suspicions" and Perry's lack of firearms expertise were what caused him to ask Mr. Evans, on December 26, 1996, to inspect some of the firearms seized from Mr. Wolfe's home (App. P, pp. 15-20; App. X, pp. 41-43). Perry turned over several of the weapons he had seized from Mr. Wolfe's gun vault to ATF Agent Evans on February 3, 1997 (App. M, App. Q, pp. 20-24). Mr. Evans' subsequent investigation resulted in the December, 1997 federal indictment of Mr. Wolfe.

(3) The general search issue.

The federal prosecutor stipulated that the entire record made before Judge Burress could be considered by Judge Gadola (App. W, pp. 3-4). Petitioner's March 10, 1998 federal motion to suppress and supporting brief alleged that the search, as conducted at his home, was "... grossly overbroad" (App. Z, p. 3; App. AA, pp. 2-3, 9-10). When counsel to Petitioner sought to question Detective Perry about the overly broad nature of the search (App. X, pp. 61-67). Judge Gadola sustained the prosecutor's objection as follows:

> "... the search may very well – certainly may be that the search was unauthorized and went too far regarding some items, but not other items. But I'm really concerned with the – with the search which discovered these

firearms and resulted in the seizure of the firearms."
(App. X, p. 66-67)

He made **no** findings upon the general search question in his September 1, 1998 Opinion. When Petitioner asked Judge Gadola to allow general search proofs to be offered and to make appropriate findings upon that issue (App. BB, pp. 9-12), the Government contended Petitioner had not offered sufficient facts upon that issue to justify the court's consideration of it (App. CC, pp. 3-5). Petitioner responded by submitting a detailed summary of the general search evidence contained within the state transcripts, and a supporting brief (App. DD, pp. 5-7, 8-58 of brief).[5] Judge Gadola refused to consider that summary (App. EE). When counsel again asked Judge Gadola to make findings of fact and conclusions of law upon the general search (and particularity) issues in January, 1999 (App. FF, pp. 3-26), Judge Gadola refused (App. B, pp. 5-9). The Court of Appeals refused Petitioner's request to remand this case back to Judge Gadola to make findings upon the general search and/or the particularity issues (App. II, p. 8).

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[5]Page limitations upon this Petition preclude even an abbreviated sampling of that submission.

(4) The particularity issues.

In March, 1998, Petitioner raised these issues in conjunction with the general search issue (App. Z, p. 3). Judge Gadola failed to make any findings upon either issue in his September 1, 1998 Opinion, and when counsel to Petitioner asked him to make such findings (App. BB, pp. 2-8), he refused to do so. The Court of Appeals held that Petitioner had not articulated in what way the warrant failed to particularly describe the items to be searched for and seized (App. F, pp. 14-16), despite specific factual arguments to that end in Petitioner's original brief (App. GG, pp. 3-6, his reply brief; App. HH, p. 3) and in his request for an *en banc* hearing (App. II, pp. 4-6).

(5) The pre-text search.

The facts pertaining to this issue are set forth in the plain view section above, and in App. DD, pp. 21-28). Basically, it is Petitioner's contention that Perry used the original search warrant as a pre-text for investigating Mr. Harp's unsubstantiated allegation that Mr. Wolfe maintained illegal firearms in his gun vault at a time when Perry knew the search warrant he was executing did not permit such a search.

(6) The Fifth and Sixth Amendment violation.

Perry offered no explanation for breaking the lock which secured the bookshelves in front of the gun vault door (App. X, pp. 27-29) (as required by M.C.L.A. §780.656) other than the affidavit and search warrant (App. Q, pp. 16-17). Petitioner was in jail when Perry called to demand the

combination to the (Wolfe's) gun vault. He knew his gun vault contained marijuana (App. T, p. 4). His request to confer with counsel had been denied (App. T, p. 3). He provided incriminating evidence because he feared for the safety of his wife and the officers (App. AA [Aff.], pp. 11-14). Perry immediately exploited that incriminating evidence by opening the door to the gun vault. The Government conceded that Perry's actions constituted a "*Miranda*" violation (App. FF, p. 10-11).

(7) The full faith and credit issue.

Petitioner's challenge to the sufficiency of the factual allegations in the affidavit to support a search of his home was upheld by the Michigan Courts (App. C, D and E). An identical claim has thus far been rejected by the Federal Courts (App. A and F).

Argument

I. The Plain View Issues (Questions 1 and 2)

(A) The need to seek a second search warrant.

Few constitutional principles are more firmly rooted in our national conscience than the romantic vision of a humble peasant withholding access to his drafty cottage **UNTIL AND UNLESS** the police obtain an arrest or search warrant from a "neutral and detached" judicial officer. *Miller v. United States*, 357 U.S. 301, 307, 2 L.Ed.2d 1332, 78 S.Ct. 1190 (1958) and *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.Ed. 436, 68 S.Ct. 367 (1948). All warrantless searches of homes are *per se* unreasonable–subject to only a

few well delineated and carefully drawn exceptions. *McDonald v. United States*, 335 U.S. 451, 456, 93 L.Ed. 153, 69 S.Ct. 191 (1948) and *Mincey v. Arizona*, 437 U.S. 385, 390, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978). These exceptions are based upon two (2) "practical" considerations, i.e., (1) that the officer would be placed in danger if he had to seek a warrant, or (2) that the evidence could be moved, lost, hidden or destroyed unless seized immediately.[6] If neither of these justifications is established, the search is *per se* illegal, no matter how obvious it was to the seizing officer that what he found in a citizen's home was evidence of a crime.[7]

Detective Perry freely admitted to facts which negate both practical justifications for his failure to seek a second

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[6]*Coolidge v. New Hampshire*, 403 U.S. 443, 467-468, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); *Chimel v. California*, 395 U.S. 752, 762-763, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1968); *Texas v. Brown*, 460 U.S. 730, 739, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983); *Arizona v. Hicks*, 480 U.S. 321, 327, 94 L.Ed.2d 347, 107 S.Ct. 1149 (1987); *Arkansas v. Sanders*, 442 U.S. 753, 762, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979); and *Mincey v. Arizona, supra.*, pp. 393-394.

[7]*Agnello v. United States*, 269 U.S. 20, 33, 70 L.Ed. 145, 46 S.Ct. 4 (1925); *Carroll v. United States*, 267 U.S. 132, 153, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *McDonald v. United States, supra.*, pp. 454-456; *Johnson v. United States, supra.*, pp. 13-15; and *Chapman v. United States*, 365 U.S. 610, 613-616, 5 L.Ed.2d 828, 81 S.Ct. 776 (1961).

search warrant. This Court has the authority to consider this aspect of the plain view issue. *Illinois v. Gates*, *supra.*, pp. 219-220.

(B) The "immediately apparent" element of the plain view doctrine.

This Court has consistently resolved the "immediately apparent" element of a plain view seizure by analyzing what facts were available **to the seizing officer at the time he/she made his/her initial observation of the evidence, together with the impact of the seizing officer's training and experience upon his/her conclusion that what was before him/her was evidence of a crime.**[8] It has never adopted a "reasonable person" in the seizing officer's situation standard. In *Arizona v. Hicks*, this court squarely held that an officer could **not**, pursuant to the plain view doctrine, move an object to acquire its serial number because he **suspected** it might be stolen, even when he contemporaneously confirmed his suspicions with a telephone call to his headquarters. To permit a plain view seizure based upon suspicion alone was said to allow warrantless seizures to occur based upon:

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[8]*Coolidge v. New Hampshire, supra.*, pp. 466, 468; *Texas v. Brown, supra.*, pp. 742-743; *Arizona v. Hicks, supra.*, pp. 326-327; *Horton v. California*, 496 U.S. 128, 142, 110 L.Ed.2d 112, 110 S.Ct. 2301 (1990); and *Minnesota v. Dickerson*, 508 U.S. 366, 379, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993).

> "lesser grounds *** than would have been needed to obtain a warrant for the same object if it had been known to be on the premises."
> *Id.*, p. 327

Before this case, the Sixth Circuit had repeatedly followed this Court's construction of the "immediately apparent" element of the plain view doctrine. Two (2) cases, *United States v. Gray*, 484 F.2d 352, 355 (6th Cir., 1973) and *United States v Szymkowiak*, 727 F.2d 95, 98 (6th Cir., 1984), involved situations where, like here, officers found firearms their search warrant did not cover. In both cases, the executing police officers were suspicious enough about the firearms to either copy serial numbers and run a check upon them after leaving the scene (*Gray*), or to call an ATF agent to the scene, and seize the firearm based upon that agent's advice (*Szymkowiak*). In both cases, the Sixth Circuit expressly held that because the facts available to the **executing officers**, at the time **they** discovered the firearms, did not allow **them** to conclude that the firearms were evidence of a crime, the seizure could not be upheld under the immediately apparent element of the plain view doctrine.

In *Szymkowiak*, the Sixth Circuit said:

> "To prevent any such abuses of the warrant requirement, we must also ensure that probable cause be '**apparent' to the executing officers at the time of discovery. In considering whether probable cause was 'apparent' to the executing officers, a**

reviewing court should be duly mindful of the executing officers' particular, subjective training and experiences." *Id.*, p. 98 (emphasis added)[9]

No federal appellate court has held that the "immediately apparent" element of the plain view doctrine can be established by a combination of the seizing officers "suspicions" or "questions," together with after-the-fact legal conclusions **by others** about existing criminal statutes or appellate decisions.[10] Nor has any court ever adopted a "reasonable person" standard in this context. To allow the decision below to stand would be to "water down"[11] the Fourth Amendment's protection by allowing warrantless

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[9]*See also*, *United States v. McLernon*, 746 F.2d 1098, 1124-1125 (6th Cir., 1984), *United States v. Beal*, 810 F.2d 574, 577 (6th Cir., 1987), and *United States v. Calloway*, 116 F.3d 1129, 1133 (6th Cir., 1997), each of which held that the "immediately apparent" element of a valid plain view seizure turns upon the **seizing officers immediate or instantaneous sensory perceptions at the time he/she discovers the evidence in plain view.**

[10]*United States v. Dart*, 747 F.2d 263, 269-271 (4th Cir., 1984); *United States v. Buchanan*, 70 F.3d 818, 825-827 (5th Cir., 1995); and *United States v. Carey*, 172 F.3d 1268, 1272-1275 (10th Cir., 1999).

[11]*Terry v. Ohio*, 392 U.S. 1, 39, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) (Douglas, J., dissenting).

seizures whenever a police officer can, for whatever reason, gain access to a citizens home and seize whatever does not "look right" to him/her–secure in the knowledge that if the accused has the temerity or stamina to fight, others will subsequently justify his/her suspicions with data he/she did not consider and which was therefore not "immediately apparent" to him/her.

II. The Probable Cause Issues (Questions 3 and 4)

Judge Hegarty had two (2) options at 7:15 a.m. on December 23, 1996, i.e., to deny Perry access to the Wolfe's premises because the affidavit did not meet the Fourth Amendment's probable cause/particularity requirements, or to allow a search which was limited to those particular areas the facts in the affidavit allowed him to conclude there was a fair probability that particularly described evidence of a crime would be located. *Coolidge v. New Hampshire, supra.*, p. 467. His decision was limited to a "common sense" evaluation **of the facts set forth in the affidavit**. He **could not** substitute his personal life experiences for what the affidavit failed to allege within its "four corners."[12]

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[12]*Aguilar v. Texas*, 378 U.S. 108, 109 fn 1, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Whitely v. Warden*, 401 U.S. 560, 565 fn 8, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971) and *Ornelas v. United States*, 517 U.S. 690, 696-700, 134 L.Ed.2d 911, 116 S.Ct. 1657 (1996).

He did neither. He read the six (6) page affidavit in five (5) minutes, asked no questions, and signed off upon a search which allowed Perry to search every container in every building and vehicle anywhere on Mr. Wolfe's premises. Judge Hegarty told Judge Burress and Judge Gadola the affidavit contained no allegations that any of the property he authorized Perry to search for and seize was in or had ever been in the Wolfe's home. He said he had previously rejected affidavits with that deficiency. The federal prosecutor stipulated to that deficiency. Despite these **undisputed** facts, the lower courts held that the affidavit contained sufficient facts to permit Perry to search Mr. Wolfe's home.

The affidavit in this case, as regards Mr. Wolfe's home, did not rise to the level of the totally conclusionary affidavit which this Court struck down in *Nathanson v. United States*, 290 U.S. 41, 47, 78 L.Ed. 159, 54 S.Ct. 11 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 113-114, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). *See also, Illinois v. Gates, supra.*, p. 239.

The scope of a search is limited to what is being searched for and to the places in which there is probable cause to believe that property may be found, i.e.:

> "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a

> suitcase. Probable cause to believe a container placed in a trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *United States v. Ross*, 456 U.S. 798, 824, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982).

The implications of permitting police officers to search one's "entire premises" including his home, when the only place an affidavit alleges that any evidence of a crime is located is a specific non-contiguous outbuilding are both obvious and frightening, particularly when tied to the expanded construction of the plain view doctrine adopted below. This Court's *Illinois v. Gates* directive that reviewing courts are to conscientiously assess whether Judge Hegarty had a substantial basis for concluding that the instant affidavit provided "probable cause" to believe that there was a fair probability that contraband or evidence of a crime will be found in "... in a particular place," *supra.*, pp. 238-239, must surely include Petitioner's home as such a particular place.

III. The Particularity and General Search Issues (Questions 5 through 8)

The very first place Perry searched, after Petitioner's arrest, was the gun vault. That entry was a classic example of an officer entering a location under the purported authority of searching for evidence of one crime when he was really interested in seizing evidence related to another crime for which he did not have a warrant. Such searches are deemed "pretexual" and their fruits should be suppressed. *Horton v.*

California, supra., p. 147 (Brennan, J., dissenting). *See also, Stanley v. Georgia*, 394 U.S. 557, 572, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) (Stewart, J., concurring).[13]

Judge Gadola refused to address or resolve any of the particularity or general search issues. The Court of Appeals refused to remand these issues back to Judge Gadola.

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[13]Traffic stop/pre-text search cases should not apply to the pre-text residential search at issue here. *Cf., United States v. Robinson*, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) and *Whren v. United States*, 517 U.S. 806, 135 L.Ed.2d 89, 116 S.Ct. 1769 (1996).

The rule of law in these areas is clear:

> "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. [FN8] Thus, the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found."[14]

Petitioner respectfully asks this Court to either remand these issues back to the District Court, or to grant the instant Petition so they can be meaningfully addressed and resolved.

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[14] *Maryland v. Garrison*, 480 U.S. 79, 84-85, 94 L.Ed.2d 72, 107 S.Ct. 1013 (1987) and cases cited at footnote 8 therein.

IV. The Fifth and Sixth Amendment Issues (Question 9)

Does a coerced extraction of incriminating evidence from one in custody whose requests to speak to counsel have been denied, require the suppression of the fruits of that admitted violation of Mr. Wolfe's "*Miranda*"[15] rights, when that violation was followed immediately by the acquisition of incriminating evidence? The Government's position is that Detective Perry was entitled to violate Mr. Wolfe's Fifth and Sixth Amendment rights because he was executing a valid search warrant when he demanded the combination to Mr. Wolfe's gun vault. That contention, of course, fails to acknowledge that Perry had not been told by anyone that the gun vault contained any of the property the search warrant authorized him to search for and seize, the evidence that he entered the gun vault to search for evidence he knew the search warrant did **not** authorize him to search for and seize, and the evidence that his pre-search training allowed him to know he was not supposed to do that very thing! Judge Gadola refused to resolve this issue, and it was one of the casualties of the Court of Appeals' page limitations. Petitioner respectfully asks that this Court consider this issue.

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[15] *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

V. Full Faith and Credit Issue (Question 10)

In Michigan, the doctrine of collateral estoppel precludes relitigation of issues in subsequent actions between the same parties or their privies when the original action resulted in a valid final judgment, and the issue in question was actually and necessarily determined in that prior proceeding. *People v. Gates*, 434 Mich. 146, 154; 452 N.W.2d 627 (1990) and *Dearborn Heights School District No. 7 v. Wayne County MEA/NEA, et al*, 233 Mich. App. 120, 124; 592 N.W.2d 408 (1998).

Petitioner understands that there are important issues posed by the absence of the federal agent at the search,[16] as well as the absence of the federal prosecutor at the state court hearing. However, because there is no question that Judge Burress conscientiously applied federal constitutional standards in his decision, Petitioner respectfully asks this Court to either consider this issue in full, or to remand it back to the District Court to develop the record.

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[16]Although ATF Agent Evans was not present at the search, his surrogate was, and he (Perry) fully intended to serve up potentially incriminating evidence to the federal government. The State brought but two (2) of the six (6) "crimes" described in the affidavit to trial, and did not convict Petitioner in either case. It has dismissed all pending cases against Petitioner and returned nearly all of the property seized on December 23, 1996.

Conclusion and Relief Requested

Justice Marshall, in his *United States v. Ross* dissent, expressed fear that this Court was considering a "probable cause" exception to the warrant requirement (p. 828). This case, as it presently stands, has bypassed that fear by accepting Detective Perry's "questions" and "suspicions" as a sufficient basis for a warrantless "plain view" seizure. Petitioner will sacrifice 41 months of his life if the lower court's suspicion based "reasonable person" construction of the plain view doctrine is allowed to stand. Petitioner therefore respectfully asks this Court to grant this Petition.

Respectfully submitted:

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